Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

FRED T. MILLER,

Petitioner,

v.

PENSION PLAN FOR EMPLOYEES OF THE COASTAL CORPORATION; THE COASTAL CORPORATION, A Delaware Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

A. QUESTION PRESENTED FOR REVIEW

In an action brought under 29 U.S.C. § 1132(a)(1)(B), does the doctrine of promissory estoppel apply to a pension fund which sent erroneous written benefit statements to an employee for ten years and then denied payment notwithstanding the erroneous statements?

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D. OPINIONS OF COURTS BELOW

1. *Miller v. Coastal Corp.*, 978 F.2d 622 (10th Cir. 1992) (appended hereto App. A).

2. *Miller v. Pension Plan for Employees of Coastal Corp.*, 780 F. Supp. 768 (D. Kan. 1991) (appended hereto App. B).

E. JURISDICTION

The Tenth Circuit Court of Appeals entered its judgment on October 30, 1992, *Miller v. Coastal Corp.*, 978 F.2d 622 (10th Cir. 1992). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

F. STATUTES INVOLVED

29 U.S.C. § 1132(a)(1)(B)

§ 1132. Civil enforcement

(a) *Persons empowered to bring a civil action.* A civil action may be brought –

(1) by a participant or beneficiary –

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

29 U.S.C. § 1002(2)(A)

§ 1002. Definitions

. . .

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent

that by its express terms or as a result of surrounding circumstances such plan, fund, or program –

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. § 1102(a)(1)

§ 1102. Establishment of plan

(a) *Named fiduciaries.* (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

G. STATEMENT OF THE CASE

Introduction

Petitioner (hereinafter "Mr. Miller") filed an action for breach of contract in the Eighteenth Judicial District, Sedgwick County, Kansas. This case was removed to the Federal District Court for the District of Kansas pursuant to 28 U.S.C. § 1446. The Respondent (hereinafter "Coastal") filed a summary judgment motion which was

granted by the District Court and affirmed by the Tenth Circuit Court of Appeals. The District Court was conferred with federal jurisdiction by 29 U.S.C. § 1132(G).

Background

[1]Mr. Miller was employed at the Derby Refinery, Wichita, Kansas, from December 4, 1950, until January 1, 1989. He was an hourly employee and a member of a collective bargaining unit until 1974. He worked as a salaried employee from April, 1974, until his retirement in January, 1989.

Benefits from 1950 until September 30, 1955, are not in dispute.

From October 1, 1955, until July 31, 1968, Mr. Miller participated in an accrued pension benefits plan under the Colorado Oil and Gas Retirement Plan, the parent corporation of Derby Refinery. Mr. Miller accrued benefits under a restated and renamed version of this plan, to wit, the CIC Industries, Inc. Retirement Plan, from August 1, 1968, to December 31, 1968. In January, 1969, CIC restated its retirement plan to establish a separate plan for members of the collective bargaining unit known as the Derby Refining Company Pension Plan ("Union Plan"). As a union employee, Mr. Miller began participation in the Union Plan on January 1, 1969, and accrued pension benefits under this plan until April 15, 1974.

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[1] Plaintiff here draws liberally from the facts recited by the Tenth Circuit Court of Appeals in its opinion. *Miller*, 978 F.2d 622.

Coastal Corporation acquired the Derby Refinery from CIC Industries in 1973. On April 15, 1974, Coastal promoted Mr. Miller to the salaried, nonunion position of Assistant Operation Superintendent. With this promotion, Mr. Miller stopped participation in the Union Plan and began participation in the predecessor to the Pension Plan for Employees of the Coastal Corporation ("Coastal Pension Plan"). Mr. Miller accrued benefits under this latter plan until his retirement effective January 1, 1989.

The Pension Plan for Employees of the Coastal Corporation specifies a benefit formula for the calculation of a participant's retirement benefits. One factor in the formula is the participant's years of "credited service." This factor was defined in the plan to include, in some instances, those years of service with the company prior to its acquisition by Coastal Corporation.

Shortly after being promoted to his salaried position, Mr. Miller was assured that his prior service with Derby Refinery would be computed as if such prior service was as a Coastal employee. For over ten years, starting in 1976 and until his retirement in 1989, Mr. Miller received written benefit statements reflecting the pension benefits he would receive on retirement. These benefits were calculated using Mr. Miller's prior years of service with Derby Refinery as if all years were as a salaried employee.

Mr. Miller filed a formal claim for these benefits under the plan on December 7, 1988. Administration of the Coastal Pension Plan is delegated to the Administrative Committee. The Committee decided that Mr. Miller's "credited service" included only those years, April, 1974, to his retirement, that he was a salaried employee with

Coastal Corporation notwithstanding the earlier oral and written representations.

H. REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit Court of Appeals ignores basic statutory construction principles and follows a course of law not yet addressed by the Supreme Court, that would leave the plaintiff and workers across the nation without a remedy which is generally available in all legal actions.

The definition of a "pension plan" in the ERISA statute clearly indicates that Congress did not intend for the federal courts to interpret only those provisions which are written in a singular, integrated document as those comprising the "terms of the plan".

The "Definitions" section of ERISA provides:

> The terms "employee pension benefit plan" and "pension plan" mean any plan or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization or both, to the extent that by its express terms *or as a result to surrounding circumstances* such a plan, fund, or program –
>
> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of

> calculating the benefits under the plan or the method of distributing benefits from the plan.

29 U.S.C. 1002(2)(A). (emphasis added)

This statutory construction shows a clear congressional intent that not only the "express terms" of the plan should govern in 29 U.S.C. § 1132(a)(1)(B) actions but the court must consider "surrounding circumstances" as mandated by the ERISA Act itself. Denying Fred Miller the use of estoppel principles in the instant case is a prime example of the harsh effects an erroneous statutory reading could produce. This is especially true when the statutory construction is such that Congress could not have intended such a reading.

The Tenth Circuit Court of Appeals pointed to language in the statute which states "ERISA requires all plans to be 'established and maintained pursuant to a written instrument.' " *Miller,* 978 F.2d at 624 (quoting 29 U.S.C. § 1102(a)(1)).

This analysis ignores the meaning which Congress gave to the words "employee benefit plan".

The Court below further premised their decision on a policy argument of actuarial soundness.[2] The error in this analysis is that Congress specifically provided for failed

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[2] The Court below quoted *Straub v. Western Union Telegraph Co.,* 851 F.2d 1262 (10th Cir. 1988) for the proposition that employees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds dispersed to other employees pursuant to oral agreements.

pensions by creating the Pension Benefit Guaranty Corporation to insure that benefits promised would actually be paid. 29 U.S.C. § 1302.[3] Moreover, the Coastal Plan states it is funded and therefore monies to pay Mr. Miller pursuant to his benefit statements exist. No detriment to other employees would result.

Further, the rule set down by the Circuit Court would mandate that average working people have a duty to know when simplified material, not rising to the level of a summary plan description, promulgated by their pension fund conflicts with the exact intricate and complex terms of a pension plan. *Miller*, 978 F.2d at 625. This view is simply unrealistic but Mr. Miller is not alone in his reliance on false promises and the insensitivity of a Federal Court of Appeals.[4]

The Court of Appeals recognized the fact that the false benefit statements were the only information Mr. Miller received regarding his benefits.[5] ERISA requires that summary descriptions be provided to employees under 29 U.S.C. § 1022(a)(1) and although this should be

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[3] Senator Bentsen stated that, "This bill establishes a program of pension insurance – modeled after the Federal Deposit Insurance Corporation for banks – which will insure that after this law goes into effect all employees will be protected in the event that their plan does terminate before becoming fully funded." 120 Cong. Rec. 29950 (1974)

[4] *Law v. Ernst & Young*, 956 F.2d 264 (1st Cir. 1992). (Accountant denied benefits he was promised by plan administrators.)

[5] The Court below states, "According to Mr. Miller, the only information he received concerning defendants' computation of credited service was provided in the form of the alleged oral and written representations." *Miller*, 978 F.2d at 625.

the primary means of informing participants and beneficiaries of plan terms,[6] Mr. Miller must shoulder the burden of relying on false documents provided him by plan administrators.

Therefore Mr. Miller and all workers provided with false plan information must suffer a wrong without a remedy which would be available to them in other types of action.[7]

I. CONCLUSION

For the foregoing reasons, we respectfully request that this Petition for Writ of Certiorari be granted and that the decision of the Court below be reversed.

Respectfully submitted,

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[6] *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 at 492 (2nd Cir. 1988)

[7] *Black v. TIC Investment Corp.*, 900 F.2d 112 at 115 (7th Cir. 1990), the court states as follows:

> It should be noted at the outset that estoppel principles generally apply to all legal actions, it is an exception to that general rule to deny the use of the doctrine. The reasons for the general application of estoppel are simple enough – the doctrine prevents a party from benefitting from its own misrepresentations.

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FRED T. MILLER, Plaintiff-Appellant, v. COASTAL CORPORATION, a Delaware Corporation; PENSION PLAN FOR EMPLOYEES OF THE COASTAL CORPORATION, Defendants-Appellees.	)	No. 92-3030 (Filed Oct. 30, 1992)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 89-1431-C)

Submitted on the briefs:

Robert W. Kaplan and David A. Hawley, Wichita, Kansas, for Plaintiff-Appellant.

John J. Murphy of Foulston & Siefkin, Wichita, Kansas, for Defendants-Appellees.

Before SEYMOUR, ANDERSON, and BALDOCK, Circuit Judges.*

BALDOCK, Circuit Judge.

Plaintiff-appellant Fred T. Miller appeals the entry of summary judgment in favor of defendants, the Coastal Corporation ("Coastal") and the Pension Plan for Employees of the Coastal Corporation ("Coastal Pension Plan"). Mr. Miller claims certain unpaid pension benefits from defendants under a federal common law estoppel theory. The district court held that no liability exists under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 to § 1461, for purported modifications to the terms of an ERISA.governed pension plan, regardless of whether the purported modifications are based on oral promises or informal written statements. *Miller v. Pension Plan for Employees of Coastal Corp.*, 780 F. Supp. 768, 771 (D. Kan. 1991). We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

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* After examining the briefs, appellate record, and appellant's statement of reasons for oral argument, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

We review the grant or denial of summary judgment de novo, using the same standards the district court applies. *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

Mr. Miller was employed at the Derby Refinery from December 4, 1950, to January 1, 1989. He was an hourly employee and a member of a collective bargaining unit until 1974. From October 1, 1955, until July 31, 1968, Mr. Miller participated in and accrued pension benefits under the Colorado Oil and Gas Retirement Plan.[1] Mr. Miller accrued benefits under a restated and renamed version of this plan, the CIC Industries, Inc. Retirement Plan, from August 1, 1968, to December 31, 1968. In January 1969, CIC Industries, which then owned the Derby Refinery, restated the CIC Industries Inc. Retirement Plan to establish a separate plan for members of the collective bargaining unit, known as the Derby Refining Company Pension Plan ("Union Plan"). As a union employee, Mr. Miller began participating in the Union Plan on January 1, 1969, and accrued pension benefits under this plan until April 15, 1974.

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[1] None of the pension benefits for Mr. Miller's employment before October 1, 1955, are involved in this case.

Coastal acquired the Derby Refinery in 1973. On April 15, 1974, Coastal promoted Mr. Miller to the salaried, nonunion position of assistant operating superintendent. Mr. Miller was no longer eligible to participate in the Union Plan and he began participating in the Pension Plan for Salaried Employees of Coastal States Gas Corporation, the predecessor plan to the defendant Coastal Pension Plan. Mr. Miller accrued pension benefits under the Coastal Pension Plan until his retirement on January 1, 1989.

Mr. Miller claims that when he was promoted to his salaried position, he was told that all his prior service would be computed as if he had been a salaried employee. Starting in 1976, Mr. Miller received annual written statements from the Coastal Pension Plan concerning his pension benefits.[2] Mr. Miller claims that for a period of ten years these annual statements calculated his retirement benefits as if he had been a salaried employee before his promotion in 1974. Mr. Miller alleges in his complaint that these written statements confirmed the

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[2] Both parties have stipulated that Mr. Miller received these annual benefit statements and that at least one of these statements included the following disclaimer:

> The information shown in this statement is based on personal information in effect at the time the report was prepared and on various assumptions as to future events. While great care has been taken in developing this information it may, in some cases, be subject to inaccuracies in the accumulation of data or in calculations. In the event of a discrepancy between the information contained in this statement and the plan document, the latter will govern.

Appellant's App., doc. C.1 at 9.

oral representation previously made and also substantiated that the Coastal Pension Plan was indeed calculating his pension benefits as though he had been a salaried employee before his promotion. Appellant's App., doc. A.1 at 3.

Upon Mr. Miller's retirement, however, his pension benefits under the Coastal Pension Plan were not calculated as though he had always been a salaried employee of the Derby Refinery. According to the terms of the Coastal Pension Plan, a participant's retirement benefit is determined under a benefit formula. One factor of the benefit formula is the participant's years of "credited service," as that term is defined by the Coastal Pension Plan. An administrative committee in charge of the Coastal Pension Plan determined that Mr. Miller's credited service for purposes of calculating his benefits under the Coastal Pension Plan included only the period during which he was actually a salaried employee of the Derby Refinery, *i.e.*, April 15, 1974, to January 1, 1989. Thus, Mr. Miller's years of employment as an hourly union employee were not treated as years of credited service under the Coastal Pension Plan. Instead, the committee decided that Mr. Miller's retirement benefit for his years as an hourly union employee should be limited to the benefit available under the terms of the Union Plan.

Mr. Miller brought this action under 29 U.S.C. § 1132(a)(1)(B) to recover those retirement benefits that he would have received had his years as an hourly union employee been treated as years of credited service under the Coastal Pension Plan. Mr. Miller does not argue that the benefits he now claims are owed to him pursuant to the language of the plan. He even concedes that to treat

his years as an hourly union employee as years of "credited service" would flatly contradict the unambiguous terms of the Coastal Pension Plan. Instead, Mr. Miller argues that defendants' oral and written representations entitle him to the benefits and, furthermore, defendants are equitably estopped from now denying these benefits. The district court found that defendants are not liable under ERISA for the benefits Mr. Miller claims.

On appeal, Mr. Miller urges this court to recognize a federal common law estoppel claim under ERISA when the claim is based upon written communications instead of oral statements. We have clearly stated in *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988), that "no liability exists under ERISA for purported *oral* modifications of terms of an employee benefit plan." (Emphasis added.) ERISA requires all plans to be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). ERISA also requires the written instrument to describe the formal procedures by which a plan can be amended. 29 U.S.C. § 1102(b)(3). In *Straub* we concluded that "ERISA's express requirement that the written terms of a benefit plan shall govern forecloses the argument that Congress intended for ERISA to incorporate state law notions of promissory estoppel." *Straub*, 851 F.2d at 1265.66.

Mr. Miller tries to distinguish *Straub* by pointing out that his estoppel claim is based primarily upon written statements, sent annually over a ten-year period, which summarized his benefits under the Coastal Pension Plan. An employee benefit plan cannot be modified, however, by informal communications, *Straub*, 851 F.2d at 1265, regardless of whether those communications are oral or

written, *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 59 (4th Cir. 1992). ERISA requires all modifications to an employee benefit plan to be written, 29 U.S.C. § 1102(a)(1), and to conform to the formal amendment procedures, 29 U.S.C. § 1102(b) (3). The district court found that the written benefit statements were not formal plan documents, *Miller*, 780 F. Supp. at 772, nor were they otherwise a part of the Coastal Pension Plan, *id.* at n.3.[3]

ERISA's requirements are designed "to protect . . . the interests of participants in employee benefit plans and their beneficiaries. . . . " 29 U.S.C § 1001(b). As we noted in *Straub*, to allow oral modifications under some theory of federal common law would undermine the protection afforded by ERISA's requirements. *Straub*, 851 F.2d at 1265 (quoting *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986)). " '[E]mployees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds dispersed to other employees pursuant to oral agreements.' " *Id.* These same concerns are implicated when, as here, a plan participant tries to enforce an informal written agreement under a theory of federal common law estoppel. As we indicated in *Straub*, we will not import notions of promissory estoppel into ERISA. *Straub*, 851 F.2d at 1265.66; *see also Peckham v. Gem State Mut.*, 964 F.2d 1043, 1050 (10th Cir. 1992) (applying *Straub* to conclude that claims based on the doctrine of promissory estoppel are precluded by ERISA). We hold that there is no liability under ERISA for purported informal written modifications to an employee benefit plan.

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[3] Mr. Miller does not challenge these findings on appeal.

Mr. Miller also raises another argument. He claims that the circumstances of this appeal demand departure from the general rule relied upon by the district court that ERISA precludes estoppel claims. He draws our attention specifically to his claim that the alleged representations *clearly contradicted* the unambiguous terms of the Coastal Pension Plan. According to Mr. Miller, the only information he received concerning defendants' computation of credited service was provided in the form of the alleged oral and written representations. Appellant's Reply Br. at 3. Further, Mr. Miller claims he relied on the computation of benefits in the annual written statements to plan his retirement years. Mr. Miller argues that the district court's ruling saddles all plan participants with an unrealistic and unjust burden – the burden to recognize when correspondence from plan administrators conflicts with the often intricate and complex terms of a pension plan. Finally, Mr. Miller argues that congressional intent, public policy, and the language of ERISA mandate that we recognize a federal common law estoppel claim in situations like this, when the substance of the alleged representations flatly contradicts the unambiguous language of the plan.

We have already decided that an estoppel claim is not available under ERISA, *Straub*, 851 F.2d at 1266, and we decline Mr. Miller's invitation to modify our decision in light of the present facts. Although Mr. Miller suggests that his circumstances are particularly egregious, we note that he makes no allegations of lies, fraud, or intent to deceive on the part of the Coastal Pension Plan. Mr. Miller refers to the written representations simply as a "mistake" made by the defendants. Although the mistake

directly conflicted with the terms of the plan, which he suggests he never saw, he could have obtained the "instruments under which the plan is established or operated" upon written request. 29 U.S.C. § 1024(b)(4). The facts of this case do not provide us the opportunity to address whether an estoppel claim exists in limited, extraordinary circumstances.

The judgment of the United States District Court for the District of Kansas is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

FRED T. MILLER,

Plaintiff

vs. No. 89-1431

PENSION PLAN FOR EMPLOYEES OF THE COASTAL CORPORATION; THE COASTAL CORPORATION, A Delaware Corporation, (Filed DEC 31 '91)

Defendants

MEMORANDUM AND ORDER

The case comes before the court on the defendants' motion for summary judgment. Plaintiff brings this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1132(a)(1)(B), to recover certain pension plan benefits under the Pension Plan for Employees of the Coastal Corporation. Plaintiff's theory of recovery is based not on the terms of the written pension plan but on certain oral and written representations made to him. The court denies the plaintiff's request for oral argument as the court is able to comprehend the parties' respective positions on the central issues from their briefs.

A motion for summary judgment gives the judge an initial opportunity to assess the need for a trial. Without weighing the evidence or determining credibility, the court grants summary judgment when no genuine issue

of material fact exists and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252. More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.' Fed. R. Civ. P. 1." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

On pages three through twelve of the pretrial order, the parties have stipulated to most of the facts pertinent to this motion. In the interest of brevity, the court will adopt those stipulations and set out herein a factual summary of them.

Plaintiff Fred T. Miller was employed at the Derby Refinery from December 4, 1950, through January 1, 1989. Over his years of employment, plaintiff participated in several different pension plans. Plaintiff was hired by Derby Oil Company as an hourly employee and participated in a pension benefit plan funded through Minnesota Mutual Life Insurance.

Colorado Interstate Gas Company purchased Derby Oil Company on October 1, 1955. Around the same time, plaintiff requested and obtained his accrued benefits from Minnesota Mutual. Plaintiff's claim in this case does not include any of these benefits accrued up to 1955 and distributed to him.

As of October 1, 1955, plaintiff was an hourly employee participating in and accruing benefits from

Colorado Oil & Gas Retirement Plan. This continued until the plan was restated and named "CIC Industries, Inc. Retirement Plan," in August of 1968. Plaintiff accrued benefits under the renamed plan through December 31, 1968.

CIC Industries, Inc., which then owned Derby Refinery, amended and restated, effective January 1, 1969, this plan establishing a separate plan for hourly employees within the collective bargaining unit and giving it the name of "Derby Refining Company Pension Plan." Plaintiff participated in this hourly union plan through April 15, 1974.

Defendant Coastal Corporation acquired the Derby Refinery in 1973. In July of that year, Coastal Corporation merged the non-union CIC pension plan into its predecessor to the Pension Plan for Employees of the Coastal Corporation. There was no merger of the Derby Refining Company Pension Plan in which the plaintiff was a participant.

In April of 1974, plaintiff was promoted from his union hourly position to the non-union salaried position of Assistant Operating Superintendent at Derby Refinery. With this promotion, plaintiff stopped participating in the Derby Refining Company Pension Plan and began participating in the predecessor to the Pension Plan for Employees of the Coastal Corporation. Plaintiff accrued benefits under this latter plan until his retirement effective January 1, 1989.

The Pension Plan for Employees of the Coastal Corporation specifies a benefit formula for the calculation of

a participant's retirement benefits. A factor in this formula is the participant's years of "credited service." This factor was defined in the plan to include in some instances those years of service with the company prior to its acquisition by Coastal Corporation. Immediately prior to Coastal Corporation's acquisition of CIC Industries, Inc., plaintiff was not a participant in a qualified pension plan of CIC Industries, Inc.

Plaintiff filed a formal claim for benefits under the plan on December 7, 1988. Administration of the Coastal Corporation Plan is delegated to the Administrative Committee. The Committee decided that plaintiff's "credited service" included only those years, April of 1974 to his retirement, that he was a salaried employee with Coastal Corporation at the Derby Refinery. Consequently, plaintiff's benefits for the years running from October of 1955 through April of 1974 were calculated at the lower amounts found in the Derby Refining Company Pension Plan rather than the higher amounts provided in the Coastal Corporation Plan.

The plaintiff received annual benefit statements concerning his benefits under the Coastal Corporation Plan. Attached to one or more of these benefit statements was the following:

> The information shown in this statement is based on personal information in effect at the time the report was prepared and on various assumptions as to future events. While great care has been taken in developing this information it may, in some cases, be subject to inaccuracies in the accumulation of data or in calculations. In the event of a discrepancy

between the information contained in this statement and the plan document, the latter will govern.

Plaintiff seeks to recover those pension benefits that he would have recovered had all of his years of employment at Derby Refining Company, beginning in October of 1955, been treated as credited service under the Coastal Corporation Plan. He alleges that upon his promotion in April of 1974 he was told his prior service would be computed as if he had been salaried employee throughout his employment at Derby Refining Company. From 1975 through 1984, with the exception of 1983, plaintiff received annual benefit statements from the Coastal Corporation Plan which showed benefits being computed consistent with the prior oral representation. On these allegations, plaintiff bases three legal theories for recovery. The oral representation and benefit statements created a contractual obligation on Coastal Corporation to pay those pension benefits, and this duty was breached with the denial of plaintiff's claim. Because of these representations, Coastal Corporation is equitably estopped from denying these benefits and the plaintiff detrimentally relied upon them.

Defendants advance three issues in support of their motion for summary judgment. Whether defendants are liable under ERISA for the pension benefits claimed on the basis of certain alleged oral and non-plan written representations made to plaintiff? Whether recovery of these benefits is available under some theory of federal common law? Finally, whether Coastal Corporation is a

proper party in this action to recover pension plan benefits under ERISA, 29 U.S.C. § 1132? The court will combine its discussion of the first two issues.

MODIFICATION OF THE WRITTEN PLAN AND FEDERAL COMMON LAW

A person may bring an action under ERISA "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). This provision basically recognizes an ERISA "breach of contract" action. *Pratt v. Petroleum Prod. Magmt. Employee Sav. Plan*, 920 F.2d 651, 658 (10th Cir. 1990). "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). Plaintiff's claim is based not on any written term of the Coastal Corporation Plan but on oral representations and non-plan written benefit statements. Consequently, the defendants are correct in their argument that the success of plaintiff's ERISA claim turns first upon whether the written plan may be modified by oral or non-plan written representations.

In *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988), the Tenth Circuit held "that no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan." In support of its holding, the Tenth Circuit cited the Eleventh Circuit decision of *Nachwalter v. Christie*, 805 F.2d 956, 959-61 (11th Cir. 1986), and quoted the following: " '[T]his requirement that ERISA plans be 'maintained' in writing

precludes oral modifications of the Plans; the common law doctrine of estoppel cannot be used to alter this result.' " 851 F.2d at 1265.

ERISA preempts all state common-law claims relating to employee benefit plans. 29 U.S.C. § 1144(a). Federal courts are vested with the power, however, to develop a body of federal common law addressing the rights and obligations under ERISA plans. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). The Tenth Circuit in *Straub* rejected an attempt to use federal common law to modify orally the written terms of the plan and adopted the following rationale from *Nachwalter*:

> "A central policy goal of ERISA is to protect the interest of employees and their beneficiaries in employee benefit plans. This goal would be undermined if we permitted oral modifications of ERISA plans because employees would be unable to rely on these plans if their expected retirement benefits could be radically affected by funds dispersed to other employees pursuant to oral agreements. This problem would be exacerbated by the fact that these oral agreements often would be made many year before any attempt to enforce them."

851 F.2d at 1265 (quoting *Nachwalter*, 805 F.2d at 960). Simply said, the Tenth Circuit will not recognize federal common law claims seeking oral modifications or amendments to the written plan since this would be counter to the express requirement that the plan be in writing and to the policy reasons behind this requirement.

The Eleventh Circuit has since clarified the scope of the *Nachwalter* holding by recognizing the distinction

between oral amendments and modifications that are not actionable and oral interpretations that could be actionable. *Alday v. Container Corp. of Am.*, 906 F.2d 660, 666 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 675 (1991). In *Kane v. Aetna Life Ins.*, 893 F.2d 1283, 1286 (11th Cir.), *cert. denied*, 111 S.Ct. 232 (1990), it was held that a federal common law claim of equitable estoppel was available to an employee who had relied to his detriment on a plan representative's interpretation of an ambiguous provision. Requiring the plan sponsors to adhere to the plan interpretations given by its plan representatives was not viewed as interfering with the important right of employees and beneficiaries to rely on the written terms of the plan. 893 F.2d at 1286. Most recently, the Eleventh Circuit applied this rationale from *Kane* to informal written interpretations of the plan. *National Companies Health P. v. St. Joseph's Hosp.*, 929 F.2d 1558, 1572 (11th Cir. 1991). This distinction between amendment and interpretation does not abridge the general rule that estoppel cannot extend the coverage of the plan. Binding the company to its interpretations of an ambiguous plan term is not an extension of coverage. *Id.* at 1572 n. 13.

Plaintiff attempts to circumvent the *Straub* decision in several ways. First, he argues it is out of step with recent cases from other circuits which have allowed estoppel claims in ERISA actions. Plaintiff particularly focuses on the discussion and reasoning in *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990). What has been handed down in other circuits is not significant for this court must march to the beat of the drum pounded by the Tenth Circuit. The Seventh Circuit in *Black* noted that the Tenth and Eleventh Circuits held a view of estoppel contrary to

what it intended to follow.[1] Plaintiff misplaces his reliance on *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980). The court in *Landro* relied on state law and did not overly concern itself with whether the remedies fashioned were consistent with the policies underlying ERISA. The court also found the term "credited service" to be ambiguous as used in the plan thereby justifying resort to extrinsic evidence. Plaintiff in the instant case does not assert that any of the relevant terms of the Coastal Corporation Plan are ambiguous.

Plaintiff next tries to distinguish *Straub*. Agreeing that the rule in the Tenth Circuit is "that oral communications between employers and employees should not be allowed to estop a denial of benefits," (Dk. 38 at 9-10), plaintiff asserts his claim is based principally on the annual *written* benefit statements which disclosed his monthly retirement income. This distinction carries no force. The *Straub* court noted that *the Nachwalter* court had cited as support, *Johnson v. Central States, Southeast and Southwest Areas Pension Fund*, 513 F.2d 1173, 1174-76 (10th Cir. 1975), a pre-ERISA case which had held "that the description of a pension plan in a booklet and letter

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[1] The Seventh Circuit in *Black* approached the estoppel question as one of public policy rather than statutory interpretation. 900 F.2d at 114. This is inconsistent with the Tenth Circuit's holding in *Straub* that focuses on the statutory requirement of a written plan and the policy behind that requirement. The court in *Black* was also careful to limit its holding to single-employer unfunded welfare benefit plans and expressly withheld its opinion on the application of estoppel principles to other situations, such as the case here involving a funded pension plan. 900 F.2d at 114-115.

were not effective to modify the written terms of the plan." 851 F.2d at 1265. Despite the citation of *Johnson* in both *Straub* and *Nachwalter,* plaintiff summarily concludes the *Johnson* decision was "overruled" with the passage of ERISA. The court rejects this unsupported and unexplained conclusion.

The Eleventh Circuit recently extended its holding in *Nachwalter* – that informal agreements could not be used to modify an ERISA plan – to reach written communications made in non-plan documents such as a summary of benefits booklet, letters sent to employees, and documents distributed at retirement seminars. *Alday v. Container Corp. of America,* 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied,* 111 S.Ct. 675 (1991). Since the formal plan document required by statute unambiguously set out the parties' rights, the *Alday* court found it unnecessary to resort to other non-plan, written statements. In the instant case, there is no challenge of ambiguity raised so this court has not reason to use the annual benefit statements in interpreting or construing any ambiguous terms of the Plan. The Eleventh Circuit in *Alday* was likewise unconvinced that any of these written statements constituted formal plan documents. *Id.*[2] In the instant case, plaintiff Miller has wholly failed to show how the benefit statements constitute the formal written plan instrument as required and defined by 29 U.S.C. § 1022. The annual benefit statements in no way resemble the comprehensive

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[2] The Eleventh Circuit cautioned that its holding would not reach a fiduciary who had made fraudulent promises in informal communications. 906 F.2d at 666 n. 15. As in *Alday,* the plaintiff here does not allege fraud.

summary plan description requirements set out by statute.[3]

Having relied on these annual benefit statements over the course of ten years, plaintiff contends it would be inequitable to deny him those benefits. In fact, he believes this is the type of "extraordinary circumstance" that in pre-ERISA cases justified the use of estoppel. In *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1165 n. 10 (3rd Cir. 1990), the court acknowledged that estoppel could be available in an ERISA case and, as an example, summarized the facts and holding from *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592 (3rd Cir.), *cert. denied*, 454 U.S. 898 (1981). There the pension fund was estopped from denying benefits on the force of a plan provision that required certain contributions to be made by the employer rather than the employee. The plaintiff employee had made some contributions himself after his pension was in jeopardy due to his employer falling behind in contributions. The *Rosen* court found extraordinary circumstance because the employee had not simply relied on mere assurances but had tendered money to the pension fund which was accepted and deposited into the fund. 637 F.2d at 598.[4] Plaintiff has not

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[3] Plaintiff has stipulated that one or more of these annual benefit statements included the disclaimer that the plan document was controlling over the annual statement. Plaintiff is unable to show that the parties intended the annual statements to be a part of the Plan.

[4] The court cited and distinguished the case of *Phillips v. Kennedy*, 542 F.2d 52 (8th Cir. 1976), in which estoppel was not allowed on the basis of assurances that the plaintiff was included in the pension plan or on the basis of misleading

come forth with any case law resembling his situation to a degree that the court could find that plaintiff had a colorable claim for an extraordinary circumstance.

Reading no argument to the contrary, the court concludes that the plaintiff apparently concedes the defendants have accurately construed the unambiguous terms of the Plan in deciding the issue of plaintiff's credited service. The defendants are entitled to summary judgment on plaintiff's ERISA claims.

PROPER PARTY

Defendant Coastal Corporation contends it is not a proper party since ERISA only permits suits against the Plan as an entity, citing 29 U.S.C. § 1132(a)(1)(B) and *Lupert v. California State Bar*, 761 F.2d 1325 (9th Cir.), *cert. denied*, 474 U.S. 916 (1985). Plaintiff does not respond to

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statements in the brochure describing pension rights. The rationale for this holding was expressed by the *Phillips* court as follows:

> The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan.

542 F.2d at 55 n. 8. The *Rosen* court distinguished *Phillips* noting that the actuarial soundness was not in jeopardy because the defendant fund was simply being required to pay in accordance with the terms of the plan.

> There is no meaningful difference between the mere assurances in *Phillips* and those made in the case at bar. In addition, the payment of pension funds here would be outside the terms of the pension plan thereby bringing into question the matter of actuarial soundness.

or contest the merits of this contention. The court, therefore, dismisses Coastal Corporation for the additional reason that it is not a proper party.

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment (Dk. 35) is granted.

Dated this 31st day of December, 1991, at Wichita, Kansas.

/s/ Sam A. Crow
Sam A. Crow, U.S. District Judge

APPENDIX C-1

29 U.S.C. § 1302

§ 1302. Pension Benefit Guaranty Corporation

(a) *Establishment within Department of Labor.* There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this title, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this title, which are to be carried out by the corporation, are –

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this title applies, and

(3) to maintain premiums established by the corporation under section 4006 [29 USCS § 1306] at the lowest level consistent with carrying out its obligations under this title.

(b) *Powers of corporation.* To carry out the purposes of this title, the corporation has the powers conferred on a nonprofit corporation under the District of Columbia Nonprofit Corporation Act and, in addition to any specific power granted to the corporation elsewhere in this title or under that Act, the corporation has the power –

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State of [sic] Federal;

(2) to adopt, alter, and use a corporate seal, which shall be judicially noticed;

(3) to adopt, amend, and repeal, by the board of directors, bylaws, rules, and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this Act and such other bylaws, rules, and regulations as may be necessary to carry out the purposes of this title;

(4) to conduct its business (including the carrying on of operations and the maintenance of offices) and to exercise all other rights and powers granted to it by this Act in any State or other jurisdiction without regard to qualification, licensing, or other requirements imposed by law in such State or other jurisdiction;

(5) to lease, purchase, accept gifts or donations of, or otherwise to acquire, to own, hold, improve, use, or otherwise deal in or with, and to sell, convey, mortgage, pledge, lease, exchange, or otherwise dispose of, any property, real, personal, or mixed, or any interest therein wherever situated;

(6) to appoint and fix the compensation of such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to define their duties, and, to the extent desired by the corporation, require bonds for them and fix the

penalty thereof, and to appoint and fix the compensation of experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code [5 USCS § 3109];

(7) to utilize the personnel and facilities of any other agency or department of the United States Government, with or without reimbursement, with the consent of the head of such agency or department; and

(8) to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary or incidental to the conduct of its business and the exercise of all other rights and powers granted to the corporation by this Act.

(c) [Omitted]

(d) *Board of directors; compensation; reimbursement for expenses.* The board of directors of the corporation consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce. Members of the board shall serve without compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred in the performance of their duties as members of the board. The Secretary of Labor is the chairman of the board of directors.

(e) *Meetings.* The board of directors shall meet at the call of its chairman, or as otherwise provided by the bylaws of the corporation.

(f) *Adoption of bylaws; amendment; alteration; publication in the Federal Register.* As soon as practicable, but not later than 180 days after the

date of enactment of this Act [enacted Sept. 2, 1974], the board of directors shall adopt initial bylaws and rules relating to the conduct of the business of the corporation. Thereafter, the board of directors may alter, supplement or repeal any existing bylaw or rule, and my [sic] adopt additional bylaws and rules from time to time as may be necessary. The chairman of the board shall cause a copy of the bylaws of the corporation to be published in the Federal Register not less often than once each year.

(g) *Exemption from taxation.* (1) The corporation, its property, its franchise, capital, reserves, surplus, and its income (including, but not limited to, any income of any fund established under section 4005 [29 USCS § 1305]), shall be exempt from all taxation now or hereafter imposed by the United States (other than taxes imposed under chapter 21 of the Internal Revenue Code of 1986, relating to Federal Insurance Contributions Act [26 USCS §§ 3101 et seq.], and chapter 23 of such Code, relating to Federal Unemployment Tax Act [26 USCS § 3301 et seq.]). or by any State or local taxing authority, except that any real property and any tangible personal property (other than cash and securities) of the corporation shall be subject to State and local taxation to the same extent according to its value as other real and tangible personal property is taxed.

(2) The receipts and disbursements of the corporation in the discharge of its functions shall be included in the totals of the budget of the United States Government. The

United States is not liable for any obligation or liability incurred by the corporation.

(3) [Omitted]

(h) *Advisory committee to corporation.* (1) There is established an advisory committee to the corporation, for the purpose of advising the corporation as to its policies and procedures relating to (A) the appointment of trustees in termination proceedings, (B) investment of moneys, (C) whether plans being terminated should be liquidated immediately or continued in operation under a trustee, and (D) such other issues as the corporation may request from time to time. The advisory committee may also recommend persons for appointment as trustees in termination proceedings, make recommendations with respect to the investment of moneys in the funds, and advise the corporation as to whether a plan subject to being terminated should be liquidated immediately or continued in operation under a trustee.

(2) The advisory committee consists of seven members appointed, from among individuals recommended by the board of directors, by the President. Of the seven members, two shall represent the interests of employee organizations, two shall represent the interests of employers who maintain pension plans, and three shall represent the interests of the general public. The President shall designate one member as chairman at the time of the appointment of that member.

(3) Members shall serve for terms of 3 years each, except that, of the members first appointed, one of the members representing the interests of employee organizations, one of the members representing the interests of employers, and one of the members representing the interests of the general public shall be appointed for terms of 2 years each, one of the members representing the interests of the general public shall be appointed for a term of 1 year, and the other members shall be appointed to full 3-year terms. The advisory committee shall meet at least six times each year and at such other times as may be determined by the chairman or requested by any three members of the advisory committee.

(4) Members shall be chosen on the basis of their experience with employee organizations, with employers who maintain pension plans, with the administration of pension plans, or otherwise on account of outstanding demonstrated ability in related fields. Of the members serving on the advisory committee at any time, no more than four shall be affiliated with the same political party.

(5) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he succeeds. Any vacancy occurring in the office of a member of the advisory committee shall be filled in the manner in which that office was originally filled.

(6) The advisory committee shall appoint and fix the compensation of such

employees as it determines necessary to discharge its duties, including experts and consultants in accordance with the provisions of section 3109 of title 5, United States Code. The corporation shall furnish to the advisory committee such professional, secretarial, and other services as the committee may request.

(7) Members of the advisory committee shall, for each day (including traveltime) during which they are attending meetings or conferences of the committee or otherwise engaged in the business of the committee, be compensated at a rate fixed by the corporation which is not in excess of the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the General Schedule [5 USCS § 5332], and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of title 5, United States Code.

(8) The Federal Advisory Committee Act [5 USCS Appx. §§ 1 et seq.] does not apply to the advisory committee established by this subsection.